Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-141

HARVEY BINKLEY,

Petitioner,

vs.

VERN HENDRICKSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No._____

HARVEY BINKLEY, Petitioner,

vs.

VERN HENDRICKSON, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF INDIANA

Petitioner respectfully prays that a writ of certiorari issue to review the final decree of the Supreme Court of the State of Indiana entered herein on April 28, 1975, denying transfer and permitting the decision of the Court of Appeals of Indiana to stand, both of said decisions reversing the judgment

of the trial court, the Circuit Court of Harrison County, State of Indiana, entered on June 30, 1973, leaving custody of the minor child, Douglas Hendrickson, in this Petitioner, the maternal grandfather of said child; said decision of the Court of Appeals of Indiana, entered on September 3, 1974, having included instructions to the trial court to enter judgment awarding the custody of said child to the Respondent herein, Vern Hendrickson, father of said child.

OPINIONS BELOW

The judgment of the trial court was not accompanied by an opinion. Upon the general finding, in an action for writ of habeas corpus brought by the Respondent herein against the Petitioner herein, that court held that in the best interest and welfare of the child Douglas Hendrickson, his custody should be awarded to his maternal grandparents, that the law is with the "defendant", and judgment was so entered for this Petitioner and against

the Respondent herein. The decree and opinion of the Court of Appeals of Indiana, reversing the judgment of the trial court is reported in 316 N.E. 2d 376, and is set forth hereinaftrr in Appendix A of this Petition, pp. A-1 to A-6. The decree and decision of the Supreme Court of Indiana, denying transfer, entered April 28, 1975, was as follows:

"ORDER DENYING TRANSFER

"Appellee's 'Petition to Transfer to Supreme Court,' as filed on October 26, 1974 1974 and Appellee's 'Amended Petition to Transfer,' as filed November 12, 1974, are each DENIED this 28th day of April, 1975.

/s/ Richard M. Givan
Chief Justice of Indiana

All Justices concur."

No petition for rehearing is allowed under the rules of the Supreme Court of Indiana from an order on petition to transfer, but upon this Petitioner's Verified Petition For Stay Of Enforcement Of Judgment, the Supreme Court of Indiana thereafter entered the following order:

"ORDER DENYING STAY

"The 'Petition to Transfer to the Supreme Court' having been denied unanimously by this Court as of April 28, 1975, the litigation between the parties was thereby terminated in this Court, pursuant to A.P. Rule 11 (B) (4);

"Therefore the 'Verified Petition for Stay of Enforcement of Judgment' is now DENIED, without prejudice to the right of the Appellee to petition the Supreme Court of the United States for Stay of Judgment pending the filing with and final determination of Petition for Writ of Certiorari by that Court.

"DONE at Indianapolis, Indiana, this 23rd day of June, 1975.

/s/ Richard M. Givan
RICHARD M. GIVAN, CHIEF
JUSTICE
"Hunter, J. Dissents."

JURISDICTION

The decree of the Supreme Court of Indiana denying transfer as against the Petitioner herein, was dated and entered on April 28, 1975. No petition for rehearing of such decree is allowed under the Indiana Rules of Appellate Procedure, Rule 11, as amended, and none was filed. No extension of time within which to petition for certiorari has been requested. The statutory provision believed

to confer jurisdiction on this Court to review the decree in question by writ of certiorari is 28 U.S.C. § 1257 and the Fourteenth Amendment to the Constitution of the United States.

The relevant portion of 28 U.S.C. § 1257 reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision may be had, may be reviewed by the Supreme Court as follows:
>
> ***
>
> "(3) By writ of certiorari...where any title, right, privilege or immunity is specially set up or claimed under the Constitution...of the United States."

QUESTIONS PRESENTED

1. Did the Supreme Court of Indiana deny and deprive Petitioner and his small grandchild equal protection of laws as guaranteed by the provisions of the Fourteenth Amendment to the United States Constitution, by denying transfer and permitting the decision of the Court of Appeals of Indiana to stand, holding that this child is not protected and entitled to the benefit of the rule of law that the best interest of the child, as determined in the discretion of the trial judge,

controls as to custody and change of custody of the minor child.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 14 to the United States Constitution, in part as follows:

> "...nor shall any state... deny to any person within its jurisdiction the equal protection of the laws."

RULE PROVISIONS INVOLVED

Appellate Rule 11 of the Indiana Rules of Appellate Procedure, of the Supreme Court of Indiana, in part as follows:

> "(B) (8) No petition for rehearing will be permitted filed upon the denial or granting of a petition to transfer..."

STATEMENT OF THE CASE

Petitioner was the respondent in the trial court, defending against a petition for writ of habeas corpus, seeking custody from Petitioner of his grandson, Douglas Scott Hendrickson, age (10) (now 12). The action was filed by the father of the boy, Respondent herein, and judgment was entered against him, in favor of this Petitioner herein, upon

a finding that it was in the best interest and welfare of the child that his custody be in this Petitioner, his maternal grandparent. The petition for the writ, labeled "WRIT", asserted that the child was wrongfully held and illegally restrained by this Petitioner, without cause or right, and asked that the child be ordered delivered to the Respondent herein, Vern Hendrickson, petitioner in the said trial court.

Prior to that time, the said trial court had obtained jurisdiction upon the action of the said Verr Hendrickson for divorce against Betty Ann Henrickson, daughter of this Petitioner, the separation of the father and son having occurred about one (1) year before the granting of the divorce, when the father had left his wife and said son. It was at that time, in 1966, that the wife and son moved to the home of this Petitioner, his grandfather, where he has remained for nine (9) years in the home of this Petitioner.

At the time of trial, the boy had lived

with this Petitioner six (6) years. Upon the granting of the divorce to the boy's mother, upon her cross complaint, custody of the boy was awarded to her. (March 24, 1967) After the death of the mother, daughter of this Petitioner, the father filed a Petition To Establish Custody, and on June 29, 1973, the same trial Court denied that petition which asked for custody of said minor child, and entered judgment that "the custody and care of said child, Douglas Hendrickson, remain and continue in his maternal grandparents, Mr. and Mrs. Harvey Binkley." In that proceeding, although there was a motion to correct errors filed by the father, respondent herein, there has been no ruling, no appeal, and said judgment remains outstanding. The Respondent did however appeal from the similar judgment against him in his action for writ of habeas corpus, and it was that judgment, against him and for this Petitioner, which was reversed by the Court of Appeals of Indiana herein, (Appendix A of this Petition), in which said Court held the welfare and best interest of this child is

not paramount and controlling as against the presumption favoring his father, Respondent herein, unless the trial court has first determined from clear and cogent evidence that there is either unfitness of the father, long acquiescence, or voluntary relinquishment. The Court of Appeals of Indiana further held the Respondent herein is entitled to the custody of the child, as a matter of law and without the exercise of discretion on the part of the trial judge--that the trial judge cannot determine that it is in the best interest of the child to be in the custody of a third party without such determination of unfitness of the parent, long acquiescence, or voluntary relinquishment--and said Court of Appeals held that the evidence does not disclose any such unfitness, long acquiescence or voluntary relinquishment of and by the father.

The decision of the Court of Appeals was not that specific findings be made, nor that a new trial be held, but that the father was entitled to custody as a matter of law.

Upon the amended petition to transfer,

denied by the Supreme Court of Indiana, it was contended by this Petitioner that:

1. The decision of the Court of Appeals of Indiana contravenes the ruling precedent of the Supreme Court of Indiana,

Mesmer v. Egland, (1926), 197 Ind. 700, 702, 151 N.E. 826; and

Jones v. Darnell, (1885) 103 Ind. 569, 2 N.E. 229

in which the Supreme Court of Indiana held that as to the custody of a child, the single question is presented: What is for the best interest of the child?

2. The decision of the Court of Appeals of Indiana contravenes the ruling precedent of the Supreme Court of Indiana,

Gilchrist v. Gilchrist, (1947), 225 Ind. 367, 75 N.E. 2d 417, 419

in which the Supreme Court of Indiana held that the right of the parent is not absolute, and must yield to the welfare of the child -- that the disposition of children is not controlled by hard and fast fules of law, but by the exercise of the sound discretion of the court confronted with the problem.

3. The decision of the Court of Appeals of Indiana contravenes the ruling precedent of the Supreme Court of Indiana,

Marshall v. Reeves, (1974), In the Supreme Court of Indiana, 311 N.E. 2d 807

in which the Supreme Court of Indiana held that a trial court's decision as to modification of custody rights will be affirmed unless a clear abuse of discretion is demonstrated by the record, and further, that the abuse of discretion rule requires the Court on appeal only to determine if the record discloses evidence or reasonable inferences therefrom which would serve as a rational basis for the finding of the trial court.

As hereinabove noted, the Supreme Court of Indiana denied transfer.

ARGUMENT

THE SUPREME COURT OF INDIANA DENIED AND DEPRIVED PETITIONER AND HIS SMALL GRANDCHILD EQUAL PROTECTION OF LAWS AS GUARANTEED BY THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY PERMITTING THE DECISION OF THE COURT OF APPEALS OF INDIANA TO STAND, HOLDING THAT SAID CHILD IS NOT PROTECTED AND AND ENTITLED TO THE BENEFIT OF THE RULE OF LAW THAT THE BEST INTEREST OF THE CHILD, AS DETERMINED IN THE DISCRETION OF THE

AS DETERMINED IN THE DISCRETION OF THE TRIAL JUDGE, CONTROLS AS TO CUSTODY AND CHANGE OF CUSTODY OF THE MINOR CHILD.

At the outset it should be noted, as pointed out to the Supreme Court of Indiana in the Amended Memorandum Brief In Support Of Amended Petition To Transfer, the Court of Appeals of Indiana totally ignored the statute which had been amended in 1965, providing that:

> Acts 1873, c. 43, as amended last by Acts 1965, c. 57, s. 1; as found in Burns, 1968 Repl., Sec. 3-1219
>
> IC 31-1-12-15
>
> "***Provided, That the jurisdiction over the child or children shall remain in the court at all times during the child's or children's minority and shall not be lost because of the death of either parent."

The Court of Appeals of Indiana held that the welfare and best interest of this child is not paramount and controlling as against the presumption favoring the father herein, even though the law of the State of Indiana, as held and determined by the Supreme Court of Indiana, was to the contrary. In the case of Mesmer v. Egland, (1926), 197 Ind. 700, 702, 151 N.E. 826, and in the case of Jones v. Darnell, (1885), 103 Ind. 569, 2 N.E. 229, the

Supreme Court of Indiana held:

Mesmer:

> "...the infant in this case was brought into court in obedience to a writ of habeas corpus. She was therefore in the custody of the court, subject to its disposition, uncontrolled by the averments of the return.
> ***
> "That the finding of the court (awarding custody to the great-grandmother against whom the action was filed, appellee on appeal) is not sustained by the evidence and is contrary to law are the causes assigned for a new trial. Generally speaking, proceedings as here, involving the custody of a child, present the single question: What is the best interests of the child? This case, as disclosed by the evidence, is no exception to the general rule. We learn from the evidence that the subject of this controvwrsy has resided with her great-grandmother (appellee) since she was five months old, except for short intervals when she visited her mother. She goes to school and attends Sunday School, and there is evidence to the effect that she has a good home with her great-grandparents, is well treated, and desires to remain with them. It appears that the mother (appellant) enjoys a splendid reputation, resides in Louisville, Ky., with her sister and brother-in-law, who bear a good moral reputation, and who have two children, 4 and 7 years old at the time of the trial, April 18, 1923. Appellant expects to take the child with her to a six-room rented home of her brother-in-law, who receives a salary of $75 a week. Appellant's only income is $14.50 to $15. a week as an employe of the Axton-Fisher Tobacco Company, where she works during the day.
>
> "We will not take the space to further recite the evidence given in the cause, as we deem it sufficient to say we would not

be warranted in holding that the finding of the trial court was not supported by substantial evidence, and therefore on that account it was not contrary to law."

Jones:

"The case at bar is very similar in its facts to that of Sturtevant v. State, 15 Neb. 459; S.C. 19 N.W. Rep. 617. In that case, as in this, the controversey was for the custody and possession of a motherless child, of but a few months' age, between the father and the maternal grandparents of such child. The statute of Nebraska, in relation to the custody of the person of the infant child, is almost identical with the statutory provision of this state, above quoted; and it was claimed in the case cited as in this case, that the statute settled the question in favor of the absolute right right of the father to the custody of the person of his infant child, as against its maternal grandparents. It was held by the supreme court of Nebraska in the case cited, notwithstanding their statute, that, if it appeared to be more for the benefit of the infant to remain with its grandparents than to be put under the care of its father, the court should refuse to direct the infant to be delivered to him; and that, in such a controversy for the custody of the child, the order of the court should be made with a single reference to the best interests of such child."

"In Schouler, Dom. Rel. Sec. 248, in declaring the American rule upon the question we are now considering, it is said: 'In this country, the doctrine is universal that the courts of justice may, in their sound discretion, and when the morals or safety or interests of the children strongly require it, withdraw their custody from the father and confer it upon the mother, or take the children from both parents, and place the

care and custody of them elsewhere. *** The cardinal principle relative to such matters is to regard the benefit of the infant; to make the welfare of the children paramount to the claims of either parent. *** The primary object of the American decisions is to secure the welfare of the child, and not the special claims of one or the other parent.'
***

"In the case in hand, after carefully examining and considering all the evidence appearing in the record, we have reached the conclusion that the best interests of appellee's child imperatively require that it should be suffered to remain, during the tender years of infancy, at least, in the custody and care of its grandparents.***"

The Court of Appeals in this case, however, held that the welfare and best interest of the child is not paramount and controlling as against the presumption favoring the natural parent.

Further, in contradiction and contravention of the law of the State of Indiana as held by the Supreme Court of Indiana in Gilchrist v. Gilchrist, (1947), 225 Ind. 367, 75 N.E. 2d 417, 419, the Court of Appeals of Indiana held "as a matter of law" that the father is entitled to the custody of the child, since it, the Court of Appeals, determined that the evidence does not disclose any unfitness, long acquiescence or voluntary relinquishment. In Gilchrist the father had been awarded custody, had re-

married, and then died. There is no indication that any adoption proceedings had been attempted, and there is no indication of any blood relationship between the child, age 10 years at the time, and the surviving wife of his father. There was no evidence that the mother was unfit, and she made the trip from her home in West Lafayette to Gary to see her son seven or eight times a year. The father did not bring the boy to her for visitation. During the three years after the divorce when the mother lived in Gary she visited her son frequently. The trial Court awarded the child to his natural mother, and although the judgment was affirmed, the Supreme Court of Indiana held as follows: 75 N.E. 2d at p. 419

> "There is no claim on either side that the stepmother, the grandmother (living with the stepmother) or the natural mother were not fit persons to have the custody of the boy. ***
>
> "At common law parents had a natural right to the cutody of their children, *** and we have statutes declaratory of the common law in this respect. Sections 8-109, 8-110, Burns' 1933.
>
> "Also under the decisions and opinions of our courts ordinarily a parent who is of good character and reasonably able to provide for his or her child is entitled to its custody as against others. ***The rights of

> parents, however, are not absolute. They must yield to the welfare of the child. Its welfare and best interest are the paramount and controlling considerations in all disputes over the custody of a child. The disposition of children is not controlled by hard and fast rules of law but by the exercise of the sound judicial discretion of the court confronted with the problem. Review by an appellate court of such disposition is limited to the question of abuse of judicial discretion."

It is obvious in this case that the child and his grandfather were singled out by the Court Of Appeals Of Indiana and the Supreme Court of Indiana (in denying transfer and allowing the decision of the Court Of Appeals to stand) for special treatment. There simply was no equal protection afforded them. The Court Of Appeals did not chose to apply the law of the State of Indiana in regard to the welfare and best interests of the child, and even went futher and held that this Petitioner lost custody and the custody of the child goes over to the father "as a matter of law", holding that the trial Court <u>cannot</u> determine that it is in the best interest of the child to remain in the custody of his grandfather, as against a <u>presumption</u> favoring his father, unless the trial court has first determined from

clear and cogent evidence that there is either unfitnrss of the father, long acquiescence, or voluntary relinquishment -- thus ruling out completely a consideration by the said Court Of Appeals of the question of abuse of discretion.

In denying this Petitioner and said child equal protection of the law of the State of Indiana it is significant to note that the Court Of Appeals was well aware, and noted in its opinion, the facts which the established law of Indiana recognizes as calling upon the discretion of the trial court in making the determination as to what is in the best interest of the child.

A. That the separation of the father and son occurred about one (1) year before the granting of the divorce, and occurred because the father left his wife and son.

B. That it was at that time, before the divorce, in 1966 when the father left the boy, that he and his mother moved in with his grandparents--this Petitioner and his wife.

C. That at the time of the hearing, 1973, the mother was deceased, and the boy, 10 years old, was still living with his maternal grandparents.

D. The boy did well in school, was happy on the farm and wanted to be a farmer. He participated in 4H activities, in scouting, and attends church regularly. His home life was happy.

Contrary to the decision of the trial Judge who heard and saw the witnesses, the Court of Appeals noted that the father now has a nice home and plenty of income, and that the law must take the boy out of the home he has known for eight (8) years and put him in a new environment with the father who left him and his mother eight years ago -- because of the right of the father -- that the trial Judge cannot weigh the best interest of the boy against the right of the father, as a matter of law.

Thus singled out this child and his grandfather are not protected by the applicable law in the State of Indiana; and the action of the Court Of Appeals and of the Supreme Court of

Indiana has denied them equal protection of the laws.

The inhibitions of the Fourteenth Amendment include the judicial branch of the State of Indiana, and the action of the Court Of Appeals Of Indiana and the Supreme Court of Indiana is state action within the meaning of the equal protection clause.

Barrows v. Jackson, 346 U.S. 249, 97 L ed 1586, 73 S.Ct. 19 (1953)

Shelley v. Kraemer, 334 U.S. 1, 92 L ed 1161, 68 S. Ct. 836, 3 A.L.R. 2d 441

CONCLUSION

For the reasons set forth above, the Petitioner respectfully prays that his petition for writ of certiorari be granted; that the decision of the Supreme Court of Indiana and the Court of Appeals of Indiana be reversed and remanded with instructions to apply the established law of the State of Indiana concerning custody of minor children in the appellate review of the decision of the Harrison Circuit Court in this cause.

Respectfully submitted,

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APPENDIX A

IN THE
COURT OF APPEALS OF INDIANA
****
No. 1-1173 A 199

VERN HENDRICKSON, Plaintiff-Appellant,) Appeal from the Harrison Circuit Court

-vs-

HARVEY BINKLEY, Defendant-Appellant.) Hon. David E. Evrard, Special Judge

****

OPINION FILED SEPT. 3, 1974

(316 N.E. 2d 376)

LOWDERMILK, Judge.

Vern Hendrickson, plaintiff-appellant, was married to Betty Ann Hendrickson, daughter of Harvey Binkley, defendant-appellee. On March 24, 1967 the Hendricksons were divorced and the custody of Douglas Scott Hendrickson, then three years of age, was awarded to Betty Hendrickson.

About a year prior to the granting of the divorce appellant left his wife and son, who then moved to Corydon, Indiana, with her parents. The son, Douglas Scott, has lived with them since that time, although his mother moved to Louisville in 1969 because of her employment. She died in August, 1972, and was still calling her parents' home her place of residence.

Appellant, after the said divorce, did, in February of 1968, marry a woman with three children by a previous marriage.

In October, 1972, appellant, Hendrickson, attempted to secure the custody of Douglas Scott Hendrickson and was refused the right of visitation. He again made an attempt to have visitation with the boy and secure his custody for a visit and was again denied that right.

Following these refusals, appellee filed a petition for the custody of the child which was heard and denied, after which appellant ceased to make support payments. The record further discloses that many payments that had been made by the appellant had not at that time been picked up from the Clerk's office.

Appellant then filed for writ of habeas corpus seeking custody of his son, Douglas Scott, to which writ defendant-appellee filed his return, alleging, among other things, that appellant was not a fit and proper person to have the custody of the child and that it was to the best interest of the child that he remain in the home of the appellee.

The evidence discloses appellant has a responsible job with a salary of $15,500 per annum and lives with his present wife and her three children in a modern, five bedroom home in Crawfordsville, Indiana, which he is buying.

Appellant's wife testified she would like to have the boy live with them in their home and when Douglas Scott visited with them he appeared to have fun and to be happy.

The evidence in behalf of the appellee was that Douglas Scott was ten years old, did well in school, was happy on the farm and wanted to be a farmer. He participated in 4-H activities, in scouting, and attends church regularly. His home life appears to be a happy one.

Special bill of exceptions number two in the transcript contains docket entries of the original divorce and is replete with petitions to modify the decree in this cause and affidavits for citation and to modify, most of which were filed by the appellant and were principally in an attempt to be able to visit and see his son, Douglas Scott, or have the said son visit with him.

The evidence further disclosed that appellant has had difficulty in his visitations

with his son from the time of the divorce to the time of the habeas corpus action. There is a dispute as to appellant's failure to pay dental bills. The mother-in-law testified she informed appellant there would be dental bills, but never told him the amounts of dental bills if any.

Following trial the court entered its judgment that *it was to the best interests and welfare of the child, Douglas Hendrickson,* that his custody be awarded to appellee Binkley and Mrs. Binkley, and so ordered.

Appellant's motion to correct errors was timely filed and ultimately presented for review the following issues:

1. Whether the facts presented a case in which the custody of the child should be awarded to the grandfather, appellee, instead of the surviving father, appellant.

2. Whether the grandfather, appellee, in the absence of any showing that the father was an unsuitable person to have custody, was entitled to the custody of the child.

3. The trial court committed an error of law in that the judgment of the court was contrary to law.

Pursuant to Ind.Rules of Procedure, Appellate Rule 8.3(A)(7), these issues shall be grouped together and treated as one.

[1] It is a well settled rule that divorce proceedings terminate entirely and die with the death of the spouse of the survivor. State ex rel. Gregory v. Superior Court, etc. (1961), 242 Ind. 42, 48, 49, 50, 176 N.E.2d 126.

The *Gregory* case, *supra,* cited the case of Combs v. Gilley (1941), 219 Ind. 139, 145, 36 N.E.2d 776, which recited the rule of common law as follows:

"'"Both under the common law and the statutes of this state, the natural parents are entitled to the custody of their minor children, except when they are unsuitable persons to be entrusted with their care, control and education." Gilmore v. Kitson (1905), 165 Ind. 402, 406, 74 N.E. 1083, 1084.'

. . . Being entitled on the death of the mother, in the absence of any showing in a proper forum, that he was an unsuitable person to have such care and custody, he would by operation of law, be entitled to have such care and custody, and could for the sake of the children permit such custody to be vested temporarily in persons other than himself."

See, also, 24 Am.Jur.2d, Divorce and Separation, § 806, Death of Custodian, p. 915.

74 A.L.R. 1353 states:

"The prevailing rule clearly is, that upon the death of the parent who has custody under a divorce decree, the right to custody automatically inures to the surviving parent."

In Sanders v. Sanders (1974), Ind.App., 310 N.E.2d 905, 907, Chief Judge Hoffman of this court, in discussing the problem we have before us, said:

"The cases recognize the common-law rule that the natural parents of a minor child are entitled to custody of the child, except where they are shown to be unsuitable persons to be entrusted with the care, control and education of the child.

. . . Thus, it has been held that these parental rights must be given a full consideration and due weight in custody proceedings, although they are subordinated to the welfare of the children. . . . However, this parental right is not cut off by a determination of custody adverse to a parent, and it may serve as a basis for a later award of custody to that parent when the circumstances surrounding the original award have changed. . . ."

See, Annotation in 39 A.L.R.2d 258.

[2] The other construction of law in Indiana is that the "best interests" of the child are paramount to the presumption in favor of the surviving parent and therefore custody of a child is not controlled by hard and fast rules of law. This proposition is exemplified in Gilchrist v. Gilchrist (1947), 225 Ind. 367, 75 N.E.2d 417, 419, wherein the court stated:

". . . ordinarily a parent who is of good character and reasonably able to provide for his or her child is entitled to its custody as against others. . . . The rights of parents, however, are not absolute. They must yield to the welfare of the child. Its welfare and best interest are the paramount and controlling considerations in all disputes over the custody of a child . . . The disposition of children is not controlled by hard and fast rules of law but by the exercise of the sound judicial discretion of the court confronted with the problem. . . ."

In Gilmore v. Kitson (1905), 165 Ind. 402, 74 N.E. 1083, the court, in discussing the fundamental principle from which the above discussed branches of law were derived, said, among other things:

". . . The principle of the welfare of the child may be applied to defeat the claims of a parent *when he has voluntarily relinquished to others* the custody and care of his child until the affections of the child and its foster parents have become so firmly interwoven that to sunder them would seriously mar and endanger the future happiness and welfare of the child." (Our emphasis.)

In *Kitson,* the natural father was entitled to the custody of his daughter after the death of his wife, as against his wife's sister, though the latter was better off financially and perhaps could have afforded the child more advantages.

It is material to the result reached in the case at bar to consider that the custody of the child, Douglas Scott, was awarded to his mother by the court and was *not voluntarily relinquished to others.* (In this case, the appellee and his wife.)

There is further evidence in the record that corroborates the fact the appellant did not voluntarily relinquish the custody of his son as the record shows he successfully resisted the petition of appellee to obtain the custody of his son after the death of his former wife.

[3] A reasonable construction of the hereinabove cited cases which utilize the "best interest" test to custody disputes between natural parents and third parties came to the correct conclusion but by a different procedure than that used in *Kitson, supra.* That is, *Kitson* and the majority rule utilizes the three step approach. First, it is presumed it will be in the best interests of the child to be placed in the custody of the natural parent. Secondly, to rebut this presumption it must be shown by the attacking party that there is, (a) unfitness, (b) long acquiescence, or (c) voluntary relinquishment such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. The third step is that upon a showing of one of these above three factors, then it will be in the best interests of the child to be placed with the third party.

The case at bar involves a surviving parent against a third party (appellee—maternal grandfather) and therefore requires a showing of one of the three factors of the "best interest" test.

Appellant's evidence as to fitness was that he was remarried and had three stepchildren. They lived in a five bedroom home in what appeared from the evidence to be a beautiful setting near Crawfordsville, Indiana. He had a job of sufficient means to support his family, including Douglas Scott. An attempt was made to show that at the time of the divorce appellant was an unfit parent to have the custody of the child but there was no evidence adduced in the habeas corpus hearing to indicate such at the present time.

[4] The burden was on appellee to make such proof of unfitness at the present time to avail himself of its benefits. Duckworth v. Duckworth (1932), 203 Ind. 276, 179 N.E. 773, 776.

The evidence is, further, that appellant made support payments to the Clerk as ordered and that the payments were never withdrawn from the Clerk's office by the appellee. (It is not clear if the mother accepted the support payments before her death. The support record was not placed in evidence and we are deprived of the benefit of having the exhibit showing the support paid in and paid out.)

As to long acquiescence, in that Douglas Scott lived with his grandparents, we must necessarily conclude from the facts before us that there was no long acquiescence. After the death of Douglas Scott's mother, the appellee brought an action to get the custody of Douglas Scott awarded to him, which was denied. This was followed by the habeas corpus proceeding we are now being called upon to determine in this appeal.

Analogous to the issue of child custody is the issue of adoption which was discussed in In Re Bryant's Adoption (1963), 134 Ind.App. 480, 189 N.E.2d 593. In referring to cases involving guardianship, divorce, or habeas corpus proceedings, the *Bryant* court remarked that the courts are more inclined to look at the material welfare of the child than to the rights of the natural parents.

> "Nevertheless, these cases are interwoven with a strong fiber of judicial protection to help bind the parent and child in their natural relationship, i. e., '* * * where the child is in the hands of a third person, that presumption is in favor of the father.' State, on the relation of Sharpe v. Banks (1865), 25 Ind. 495."
>
> *Bryant, supra*, 189 N.E.2d at 598.

The *Bryant* court further remarked that there must be strong and cogent reasons to justify the withholding of this presumption and further stated:

> "While, as stated hereinabove, some confusion exists in the application of the 'child's best interest rule' it is never an issue for judicial determination in an adversary adoption proceeding until the ultimate fact of 'abandonment or desertion' or 'failure to support', has been first established by clear, cogent and indubitable evidence. If we were to sustain the trial court's decision in the case before us we would by judicial precedent, lend approval to and provide a media for, the advance of governmental paternalism."
>
> 189 N.E.2d at 600.

[5] Similarly, in custody cases, especially as here where a certain permanency of custody is involved, the court cannot determine that it is in the best interests of the child to be placed within the custody of

a third party, as against the presumption favoring the natural parent, unless the trial court has first determined from clear and cogent evidence that there is either unfitness of the appellant, long acquiescence, or voluntary relinquishment. If the "best interest rule" was the only standard needed without anything else, to deprive the natural parent of custody of his own child, then what is to keep the government or third parties from passing judgment with little, if any, care for the rights of natural parents. In other words, a child might be taken away from the natural parent and given to a third party simply by showing that a third party could provide the better things in life for the child and therefore the "best interest" of the child would be satisfied by being placed with a third party.

[6] The evidence does not disclose any unfitness, long acquiescence, or voluntary relinquishment of the appellant father, surviving parent. We now hold as a matter of law the appellant father is entitled to the custody of the child, Douglas Scott Hendrickson, absent any such showing.

Judgment reversed and remanded with instructions to the trial court to enter judgment herein awarding the care, control and custody of Douglas Scott Hendrickson, minor son of the appellant, Vern Hendrickson, to Vern Hendrickson and for any further proceedings not inconsistent with this opinion.

ROBERTSON, P. J., and LYBROOK, J., concur.